

STATE OF MICHIGAN
COURT OF APPEALS

ALLA MODA CONSTRUCTION, INC.,

Plaintiff/Counter-Defendant-
Appellee,

v

OSCAR W. LARSON COMPANY,

Defendant/Counter-Plaintiff-
Appellant,

and

MERCHANTS BONDING COMPANY,

Defendant-Appellant.

UNPUBLISHED
September 26, 2006

No. 260696
Oakland Circuit Court
LC No. 2003-048025-CK

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment, following a bench trial, awarding plaintiff \$12,579.64, plus attorney fees and costs, in this breach of contract action. We affirm.

I. FACTS

Defendant Oscar W. Larson Company (hereafter “defendant”) was the general contractor for a project involving the construction of a gasoline station at a Sam’s Club store in Auburn Hills, Michigan. Plaintiff contracted with defendant to install some stonework and also some exterior trim or molding, referred to as the exterior insulation finish system (“EIFS”). Plaintiff completed most of the stonework, but defendant’s employees finished the stonework portion of the job and another subcontractor was hired to perform the EIFS portion of the job. After defendant refused to pay plaintiff for any of its work, plaintiff brought this action seeking payment of the contract price for the stonework portion of the job. Defendant filed a counterclaim, seeking damages for the materials and labor required to repair and complete the stonework portion of the job. Defendant further claimed that plaintiff anticipatorily breached the EIFS portion of the contract, and defendant sought damages for the cost of hiring another contractor to complete the EIFS work.

The trial court awarded plaintiff the contract price of \$13,800 for the stonework, less \$1,220.36 for the cost to replace some damaged sills, and further found that defendant had released plaintiff from the EIFS portion of the contract. It therefore awarded plaintiff a judgment of \$12,579.64.

II. FINDINGS OF FACT

On appeal, defendant first challenges the trial court's findings of fact.

A. Standard of Review

"This Court reviews a trial court's findings of fact in a bench trial for clear error and its conclusions of law de novo. MCR 2.613(C)." *Alan Custom Homes, Inc, v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "Furthermore, where the trial court's factual findings may have been influenced by an incorrect view of the law, an appellate court's review of those findings is not limited to clear error." *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

B. Analysis

First, the trial court did not clearly err in finding that plaintiff was willing to complete the remaining stonework, including any necessary repairs, but was not given that opportunity by defendant. Evidence was presented that plaintiff's president, Robert Silvestri, left a telephone message for defendant's project manager, Matthew Fill, in which he expressed that he would finish the stonework and would meet with Fill to discuss what needed to be done, including any necessary repairs, and that Silvestri and Fill subsequently discussed the situation in another telephone conversation. Fill either cancelled or failed to show up for the meeting, and defendant's employees instead completed the stonework without notifying plaintiff. The trial court did not clearly err in finding that plaintiff was willing to complete the stonework, but was denied that opportunity by defendant.

Next, defendant argues that the trial court erred in finding that Fill released plaintiff from the EIFS portion of the contract. The trial court did not rely solely on Silvestri's telephone message in its findings regarding this matter, but also considered evidence of the subsequent telephone conversation between Silvestri and Fill. According to Silvestri, Fill wanted the EIFS work completed over the Labor Day weekend, a deadline Silvestri was not able to meet, so Fill told Silvestri that plaintiff would not have to perform the EIFS work if Silvestri agreed to help find a subcontractor to perform that work over the weekend. There is no dispute that another subcontractor was hired and tried to complete the project over the holiday weekend. The trial court found that Silvestri helped arrange for the replacement contractor and that plaintiff was therefore relieved of its obligation to perform the EIFS portion of the contract. We agree that Silvestri did not offer to find a replacement contractor in the telephone message that Silvestri left for Fill. According to Silvestri, however, that offer was made in the subsequent telephone conversation with Fill. Although Fill denied making the offer, the trial court expressly found

Silvestri's version of that conversation more credible. We defer to the trial court on questions of credibility. Accordingly, we find no clear err in the trial court's findings of fact on this point.

Defendant also argues that the trial court erred in finding that plaintiff was not liable for all of the costs of the materials necessary for the EIFS work. The trial court recognized that it was necessary to address this matter only if plaintiff had not been released from the EIFS portion of the contract. Because the trial court did not clearly err in finding that the parties had modified their original agreement to release plaintiff from performing the EIFS work, this issue need not be reached.

Next, defendant argues that the trial court erroneously found that the supplier of materials for the stonework and the EIFS work, NAI Senergy of Michigan, was trying to recover for the EIFS materials on defendant's lien claim when the testimony indicated that Senergy was only attempting to recover for the materials it supplied for the stonework. To the extent that the trial court commented on any rights or obligations of Synergy, defendant has not shown that it affected the court's determination of the respective rights and obligations of plaintiff and defendant, particularly in light of the court's determination that defendant released plaintiff from the EIFS portion of the contract.

III. APPLICATION OF LAW

Apart from challenging the trial court's findings of fact, defendant also challenges several of the court's conclusions of law.

A. Standard of Review

Defendant first argues that the trial court incorrectly applied the law regarding mitigation of damages. "In both contract and tort actions, an injured party must make every reasonable effort to minimize damages." *Bak v Citizens Ins Co of America*, 199 Mich App 730, 736; 503 NW2d 94 (1993). An injured party may not recover for any damages which could have been avoided by reasonable means under the circumstances. *Morris v Clawson Tank Co*, 459 Mich 256, 263-264; 587 NW2d 253 (1998).

B. Analysis

The trial court found that defendant did not mitigate its damages because it did not offer plaintiff an adequate opportunity to correct any problems with the stonework. Defendant complains that the trial court did not specifically find that its actions were not "reasonable." Although the court did not use the term "reasonable," it recognized that the duty to mitigate involves the duty "to use ordinary care to minimize . . . damages," and it evaluated the case in this context. As previously discussed, the trial court found that Silvestri had informed Fill that he would complete the stonework, including any necessary repairs. Silvestri expressed as much in his telephone message. Silvestri discovered defendant's employees finishing the stonework less than two days later, when Silvestri arrived at the worksite. Although defendant argues that it was attempting to mitigate its damages by having its own employee perform the work, under the circumstances, the trial court did not err in finding that defendant did not afford plaintiff a sufficient opportunity to complete the work. Therefore, the trial court did not err in holding that

defendant was not entitled to damages for the cost of its employees' labor, but could set off the cost of the new materials needed to repair the stonework.

Defendant further argues that the trial court confused the duty to mitigate damages with the opportunity or right to cure. Defendant does not cite any authority in support of this argument, and as a result, it is waived. *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998). Regardless, we are not persuaded that the trial court erroneously applied the rule on mitigation of damages to the facts of this case.

Defendant next argues that the trial court erred by not deducting from the amount awarded for the stonework the amount that plaintiff would have incurred to pay its subcontractor to perform the work to correct the defects. Although there was evidence that Silvestri was assisted by a subcontractor when installing the stonework, the evidence did not establish that Silvestri would have required assistance in completing that work. Therefore, we reject defendant's claim that it was entitled to an additional setoff for the cost of hiring a subcontractor.

Although defendant again argues that plaintiff should have been required to pay the increased costs incurred to complete the EIFS work, in light of our conclusion that the trial court did not err in finding that plaintiff was released from that portion of the contract, we again reject this claim of error.

We also reject defendant's argument that any modification of the parties' original agreement to release plaintiff from the EIFS portion of the contract is unenforceable because it was not in writing. The trial court found that Silvestri agreed to find a replacement contractor to complete the EIFS over the holiday weekend, which was sufficient consideration for the modification. Because the oral modification was supported by independent consideration, a writing was not required. See MCL 566.1; *Michigan Nat'l Bank of Detroit v Holland-Dozier-Holland Sound Studios*, 73 Mich App 12, 17-18; 250 NW2d 532 (1976).

IV. FAIR TRIAL

Defendant next argues that "irregularities" in the proceedings denied it a fair trial. Defendant did not object to the alleged "irregularities" at trial, but raised this issue in its motion for a new trial, which the trial court denied.

A. Standard of Review

A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996). If the reasons cited by the trial court for granting a new trial are legally recognized and supported by any reasonable interpretation of the record, the trial court has acted within its discretion. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539; 506 NW2d 890 (1993).

B. Analysis

Defendant's arguments are principally directed at the trial court's conduct. A trial court has wide discretion and powers in matters concerning the conduct of the trial. *Barnett v Hidalgo*, 268 Mich App 157, 170; 706 NW2d 869 (2005). It is the responsibility of the trial court to

control the introduction of evidence and the arguments of the attorneys, limiting them to relevant and material matters. *Tobin v Providence Hosp*, 244 Mich App 626, 640; 624 NW2d 548 (2001).

Considered in context, the trial court's questions and comments to defendant's attorney, during both opening statement and the course of trial, were intended to get counsel to focus on the relevant legal issues in the case. This was a bench trial, and a court has greater discretion when conducting questioning and controlling the proceedings in a bench trial. *In re Jackson*, 199 Mich App 22, 29; 501 NW2d 182 (1993). Although defendant complains that it was not permitted to complete its opening statement, defendant had filed a trial brief that set forth its theories and it is apparent from the court's questions and comments that it was aware of the issues in the case.

Defendant also argues that it was denied the opportunity to challenge Silvestri's credibility and point out inconsistencies in Silvestri's testimony during cross-examination. Although defendant cites portions of the record in support of this argument, it does not explain why the court's rulings were improper or amounted to an abuse of discretion, or how it was prejudiced. A party waives appellate review of an issue by giving it only cursory treatment in its brief. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 251-252; 673 NW2d 805 (2003). Defendant has not established any error with respect to this issue.

Defendant also argues that the trial court's questioning of two witnesses was intimidating, argumentative, prejudicial, unfair, and partial. Again, defendant merely cites the portions of the record where the questioning occurred without explaining why the questioning should be considered improper or prejudicial. The record does not reveal that the witnesses were actually intimidated, or that the court's questioning denied defendant a fair trial. We therefore reject this claim of error.

Finally, the record does not support defendant's claim that it was denied the opportunity for closing argument. The record discloses that the trial court interrupted defense counsel only after he gave a substantial closing argument. This interruption toward the end of defendant's closing argument did not deprive defendant of a fair trial.

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette